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THE ASSOCIATION OF THE BAR.

A MEETING of the members of the legal profession, in this commonwealth, was holden early in last month (January) to take measures for organizing an association among themselves. The chief objects of this association were explained to be to promote social intercourse between the members and to rescue the profession from the odium which sometimes attached to it from the improper conduct of some of its members. This first meeting was understood to be merely preliminary, and no other proceedings were had than the appointment of a committee, who were directed to report a plan of organization for the proposed association, which should report at an adjourned meeting. This committee consisted of several members of the bar from the county of Suffolk, and one from each of the other counties, and included some of the ablest and most learned and experienced gentlemen of the profession. The meeting was unusually full, and was very generally attended, even by those lawyers most advanced in age, and who, generally, take no active part in proceedings of this character. Gentlemen from the country were present in considerable numbers, and a disposition was manifested by all to make their profession eminently worthy of the confidence of the public.

The adjourned meeting was holden on the 18th ult., when a

constitution[1] was reported on behalf of the committee, by Robert Rantoul, Jr., Esq., district-attorney of the United States. This constitution was quite long and complicated, and had evidently been prepared with care. There was a division of opinion as to the true course to be adopted. All perceived that the contemplated measure was attended by a good many difficulties, and that it ought not to be considered in haste. One gentleman from Boston suggested that it would be better to lay the report of the committee on the table, and to print the constitution as reported, for circulation among the members of the bar. But as many gentlemen were present from a distance, and an opportunity seemed to present itself which ought not to be neglected, it was finally decided to consider the constitution, as in committee of the whole, and to take the sense of the meeting upon it, article by article. The result proved that the whole day was insufficient even for this task, and at the adjournment in the evening, several articles remained undisposed of; and it was then finally decided to lay the whole matter upon the table, and that the committee be authorized to cause copies of the constitution to be printed and circulated among the profession, and to call a future meeting for considering the subject.

The attendance at both these meetings was so general and so eminently respectable, and the interest taken by all so strong, that we feel it to be due to our readers to give a slight sketch of the general plan of the proposed association, and of the views which were expressed by different gentlemen. Nor do we offer any apology to our readers out of the state, for although this association is only a local affair, yet it is hoped that whatever is finally decided upon, may be made worthy of respect and imitation out of the commonwealth.

It is proposed that this association shall consist of all gentlemen admitted to practise in the courts[2] of this commonwealth, who may voluntarily connect themselves with it, and who may retain their connection by the performance of the few duties required, and by preserving a strict line of professional deport-

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[1] See Miscellaneous Intelligence.

[2] The original draft contained the expression "admitted to the bar," but the meeting having been seized with a mania for accuracy of expression, the district-attorney suggested that "*admitted to the bar*" might refer to a privilege over which prosecuting officers are supposed to have a somewhat exclusive control.

ment. The officers of the society are to be a president, vice-presidents, secretary, solicitor, treasurer, and directors, (two from each county,) all of whom, except the solicitor, shall constitute an executive committee. The solicitor is to be the prosecuting officer, and is to receive complaints against members of the association, signed by any person, (whether a member of the association or not,) which may be presented by him to the executive committee, in which case any member of the association may be appointed to assist him, and proceedings against the accused parties may be conducted before the committee after due notice to the party complained of to appear and answer. Three-fourths of said committee may, after a hearing, expel such a person, but an appeal will lie from their decision to the association itself, and upon the appeal, a vote of three-fourths will again be required. The association propose to take cognizance also of malpractices committed by lawyers not included within their organization, so far at least as to expose them, and it is made the duty of all members of the profession to abstain from professional intercourse with those who shall be decided unworthy of it. And all members of the association are required to receive and consider, and, if thought proper, to report to the solicitor any suggestions of malpractice or professional misconduct on the part of any member.

Several points were made in the discussion, all of which were interesting, and some of which were debated with considerable zeal, though with a most remarkable degree of courtesy. One was upon the matter of discipline. The draft of a constitution reported by the committee, provided that the solicitor should receive complaints *in writing, signed by a member of the association*. This form had been adopted by the committee after reflection and discussion. Some gentlemen objected to it, thinking it sufficient to require that complaints should be verified to the solicitor's satisfaction. Others insisted that the intervention of a written document was necessary to relieve the solicitor from a responsibility, which probably no one would be willing to assume. Then a suggestion was made that the public ought to have access to the solicitor directly, and that the proposed association would become odious, if it appeared that the protection which it guaranteed was only to be obtained by first securing the assistance of one of its members, and that if

such a rule were enforced, the solicitor would find nothing to do. On the other hand, it was urged that there was great danger of frivolous and malicious complaints. One gentleman mentioned it as a fact, that several instances were known to have occurred of clients who, having lost their cases, vented their indignation against their lawyers, by complaints before the grand jury! It was further said, that such an arrangement would render the office of solicitor an extremely embarrassing and laborious one, and that as to the objection that an opposite course would make the association odious before the public, it really did not become us to take the ground that the profession in general had not the entire confidence of the public. Still further, it was urged that by encouraging a system of secret complaints, not only from members, but from any whose malice prompted them, the foundation was laid of a pretty despotic and even inquisitorial body, at whose mercy the reputation of every member of the bar would be laid. As well as can be remembered, these were the views of Hon. George Lunt, whose speech made a decided impression, and who at one time, secured a vote. This question was however settled by providing that the solicitor might receive *written* complaints *from any person.*

Another curious question arose, quite unexpectedly too. Some inquiries having been made as to the mode of obtaining evidence, and it having been proposed to take depositions agreeably to existing statutes, it was observed that this would involve the administration of extra-judicial oaths, which are prohibited by Rev. Stat. ch. 128, § 24. All were satisfied that the objection was fatal, and the matter was passed over.

In regard to the course to be adopted "as to outsiders," as it was called in conversation, or as to those who were not members of the association, there was a great division of opinion. A number contended that the association should only attempt to control its own members — that an association which should attempt to control the social and professional rights of lawyers, generally, might, if it fell into bad hands, become a most mischievous affair, and that at any rate it could do little good. One gentleman referred to the somewhat parallel case of the Massachusetts Medical Society, who undertook to suppress quackery by procuring the passage of a law that none but members of their society should be entitled to recover fees for medical

services. What was the result? Was quackery stopped? Was the community protected from extortion? Not at all. The quacks collected their fees in advance. So if an attempt is made by this association to frown down disreputable conduct among those assuming to be lawyers, is there any reason to hope that the public will be protected? Will not the same harpies still impose upon the ignorant? Will their signs be taken down or their offices closed? It was thought by some that all such attempts to influence professional conduct would prove futile.

Then it was remarked that inasmuch as the Revised Statutes (ch. 88, § 25,) provided for the removal of members of the bar for malpractice, the duty of an association would be exhausted by proposing the case of a delinquent member of the bar (not of their own number) to the court for expulsion. This matter was left somewhat indefinitely, though the last suggestion was well received.

One other question arose, which gave rise to considerable discussion, and although some vote was taken, it did not seem to be considered as settled. It was in regard to the professional and social intercourse which should subsist between members of the association and those placed under its ban. The article of the constitution reported by the committee, recommended the most rigorous and severe system of non-intercourse. It even prohibited members of the association from appearing in any case with a proscribed lawyer. Two objections were suggested. One, that such a rule would be unjust to clients, and in this connection, Judge Thomas suggested a strong case. It was this. Suppose a member of the association should be retained under the following circumstances; — a person involved in a serious law-suit should find, when it was too late, that the lawyer whom he had first engaged was unfit for his task, that he had in fact been pronounced disreputable by the bar association, and was therefore anxious to secure further assistance. Yet it might be impracticable to give up the first lawyer. His familiarity with the case might be such, as at that stage to make it indispensably necessary to have him at hand. It would be the client's misfortune, not his fault, and it would be hard that he should suffer. The other objection was interposed by Mr. Apthorp, of Boston, to the effect that it was not justifiable

to proscribe any for life, that there should be some *locus penitentiæ* — that it was neither for the interest of the profession nor of the community that a set of abandoned and desperate practitioners should grow up among us, whose only chance of obtaining a livelihood consisted in the recklessness of their course. Was it the course of true wisdom? Was it the course which a proper regard for the rights of others would suggest? The offence might be flagrant, the injury done to the profession and to society, might be deep and lasting; yet it did not seem that the unfortunate object of professional indignation should remain forever disgraced. There are those now in the profession, in the city of Boston, who have recovered from the infamy of a previous course, and who are leading honest and respectable lives. This is, moreover, the result to which an enlightened and true philosophy would lead, and conforms to that principle which is more and more practised upon each day. It was a little singular that during this very discussion, a petition was circulating for signatures, which received the approbation of nearly every member of the bar, in behalf of the society in aid of discharged convicts. The principle assumed by this society is, that a penitent offender is most especially entitled to the sympathy, and that if this right be denied by society, it is nearly impossible to save one from offending again. The idea of perpetual disgrace is reprobated and discarded. Yet, while this petition was circulating, a discussion was going on in favor of consigning unworthy members to perpetual ignominy. It should be remembered, moreover, that in proportion as one's station was previously more elevated, so is the fall more dreadful, and the more refined and cultivated the intellect, the more acute and overwhelming will be the feeling of despair.

Upon these suggestions, the hour having grown late, and a division being found to exist, the members separated, leaving everything unsettled. The discussion was conducted with great ability throughout the day. The utmost candor and courtesy prevailed, and it was admitted by all, that even if matters were to stop there, to have had such a discussion would in itself have been well worth all the time which had been spent. Its influence was felt to be so salutary, that although it would be improper at this stage of the matter to express any opinion upon the plan suggested, yet it was thought that a

sketch of what was said would interest our readers at a distance as well as at home.

Recent American Decisions.

Circuit Superior Court of Law and Chancery for the County of Accomack, Virginia, June 7, 1848.

ARCHIBALD REID *v.* JAMES H. WHITE.

A plea of a former judgment in favor of the defendant, is a plea in estoppel, and must have the proper commencement and conclusion of such a plea, relying on the estoppel.

The former judgment is no estoppel unless it were rendered on the merits; but that fact need not be averred in the plea.

On a *scire facias* against bail the defendant cannot object that the affidavit on which the principal was held to bail was insufficient.

Bail was required in an action of assumpsit, but the recognizance of bail acknowledged before the sheriff and retained by him, describes the action as an action of debt: *Held*, nevertheless, that the recognizance was valid and sufficient.

AN action on the case, in *assumpsit*, was brought by the plaintiff against William Ewell, in the county court, and on affidavit by the plaintiff according to the statute, a justice of the peace, by an indorsement upon the writ, directed the sheriff to require bail of the defendant.

The writ was duly executed, and whilst the defendant was in custody, the present defendant, White, entered into a recognizance as his special bail, and he was thereupon discharged. The recognizance is in these words: "Accomack county, to wit — Memorandum. That upon 25th day of March, 1844, James H. White, of the county of Accomack, personally appeared before me, Lewis L. Snead, deputy-sheriff of said county, and undertook for William Ewell, at the suit of Archibald Reid, in an action of debt now depending in the county court for Accomack county, that in case the said William Ewell shall be cast in said suit, he the said William Ewell will pay and satisfy the condemnation of the court, or render his body in execution for the same, or that he the said James H.

White will do it for him." This is duly certified by the deputy-sheriff, and acknowledged by White under his hand and seal.

The recognizance is duly returned, together with the writ, to the office from which the writ issued, and there filed and preserved amongst the papers of the cause.

The plaintiff recovered a judgment against Ewell, and afterwards sued out a *scire facias* upon the recognizance of bail, in the county court, which, by consent of parties, was removed to this court. The *scire facias* is in the usual form, except that after setting forth the recognizance according to what is averred to be its legal effect, it sets it out *in hæc verba*.

The defendant has pleaded to the *scire facias*: 1. A plea of a former judgment in his favor; 2. A plea of *nul tiel record* as to the recognizance; 3. A special demurrer; and 4. A general demurrer.

The former judgment pleaded is a judgment of this court between these parties, in a case of *scire facias* upon a recognizance of bail. Upon a demurrer to that *scire facias*, the court was of opinion that there was a variance between the recognizance set forth therein and the recognizance filed in that cause, and therefore gave judgment for the defendant.

The defendant, by his special demurrer, after craving *oyer* of the recognizance, sets forth the following causes of demurrer: 1. That the recognizance was taken in an action of debt, whereas the action, in which bail was directed, was an action of trespass on the case in assumpsit; 2. That there is a variance between the recognizance and the action in which bail was authorized to be taken; 3. That there is a variance between the action mentioned in the recognizance, and that in which bail was ordered to be taken by the justice of the peace; and 4. That the *affidavit* was insufficient in law to authorize the justice of the peace to require bail to be taken.

In the general demurrer, *oyer* is craved of the record of the suit and of the recognizance.

The plaintiff has put in to the plea of a former judgment a special demurrer, on the plea of *nul tiel record*, and joined in the defendant's special and general demurrers.

By the special demurrrer, the plaintiff craves *oyer* of the judgment, and sets forth as causes of demurrer: 1. That the said plea does not aver that the former judgment was upon the

merits; 2. A want of certainty in the plea; 3. That the plea is a plea in estoppel, and has not the beginning and conclusion proper in pleas of estoppel; and 4. That the plea speaks of the "supposed recognizance," and, being a plea in confession and avoidance, must directly admit what it seeks to avoid.

And the defendant has joined in the plaintiff's special demurrer.

SCARBURGH, J. This case has been ably and elaborately argued on both sides; but there is one point which has entirely escaped the notice of both parties. It is not averred anywhere in the *scire facias* what the action was, in which the recognizance of bail was taken. Such an averment is not mere matter of form, but matter of substance, and the omission of it is a defect, which is reached by the defendant's general demurrer. But as a decision upon this point would not be final between the parties, I have considered the case precisely as if this averment were in the *scire facias*, presuming that the parties desire a final disposition of it, and that the necessary amendment will be allowed by consent.

The defendant's plea of a former judgment in his favor is defective in both *form* and *substance*.

It is defective in form, because it has not either a proper *commencement*, or a proper *conclusion*. It is a plea in estoppel, and all pleadings, by way of estoppel, have a *commencement* and *conclusion* peculiar to themselves, the estoppel being relied upon in each. So essential has it been considered that the estoppel should be relied upon in the conclusion of a pleading, that it has been said to be not merely a matter of form so to rely upon it. 1 Saun. R. 325 *a*, n. (4); 1 Stephen's Pl. 240; Ibid. 399; 3 Co. Litt. 433, Thomas's ed.; *Rawlins's case*, (4 Co. R. 53); 1 Chitty's Pl. 540, 589, 592; *Doe* v. *Wright*, (10 Adol. & E. 763); 37 Eng. C. L. R. 22; 2 Salk. 713. The commencement of a plea in estoppel, as given by Stephens, is as follows: "Says, that the said A. B. ought not to be *admitted* to say" (stating the allegation to which the estoppel relates); and the conclusion as follows: "wherefore he prays judgment if the said A. B. ought to be admitted, against," &c. (stating the matter of estoppel) "to say, that" (stating the allegation to which the estoppel relates.) Ste-

phen's Pl. 399. See also *Palmer* v. *Temple*, (9 Adol. & E. 508; 36 Eng. C. L. R. 181.)

Instead of the commencement of this plea being "that the said Archibald Reid his execution," &c. "to have ought not," it should have been "that the said Archibald Reid ought not to be *admitted* or *received* to have his *scire facias* aforesaid;" and the conclusion, instead of being "wherefore he prays judgment if the said plaintiff ought to *have* or *maintain* his aforesaid writ of *scire facias* and have execution against him, the said defendant, of the damages, costs, &c., aforesaid, by pretext of the recognizance aforesaid, &c.," should have been "wherefore he prays judgment, if the said plaintiff ought to be *admitted* or *received* to his said *scire facias contrary* to the *judgment* aforesaid and to the said *record*." See *Doe* v. *Wright*, (10 Adol. & E. 763; 37 Eng. C. L. R. 222.)

This is certainly a purely technical objection. But it is to be recollected that, according to Lord Coke, an estoppel is where a man is concluded by his own act or acceptance to say the truth. (3 Co. Litt. 430, Thomas's ed.) It is something of so high and conclusive a nature, that the party whom it affects is not permitted to aver against it or offer evidence to controvert it. (2 Smith's L. C. 431.) So that when an estoppel is pleaded, the question is not whether the plaintiff ought to *have* or *maintain* his action, for that would involve an inquiry as to the *merits;* but whether he ought to be *admitted* or *received* to implead the defendant in regard to the matter to which the estoppel relates. And if there be really an estoppel, it shuts out all inquiry as to the merits, because the plaintiff is estopped to speak what may be the truth in regard to them. And the forms of pleading, by way of estoppel, are founded upon this principle.

But it is said by Chitty, that in replications in estoppel, and indeed in all other replications, it is sufficient, after the proper verification, to pray judgment generally, without pointing out the appropriate judgment. (1 Chit. Pl. 633.) And the reason is, that the facts being known, the court is bound to pronounce the proper judgment. (Ibid. 446.) This doctrine, however, applies only to cases, where advantage has not been taken of the defect by a special demurrer. Ibid. 540; 2 Saund. R. 190, n. (5); Ibid. 103, *c.* n. (*c.*)

The other causes of demurrer assigned by the defendant to this plea cannot be sustained. The judgment pleaded must, to avail the defendant, be a decision upon the merits; but whether it is or not is a conclusion of law to be drawn from the matter pleaded, and need not be directly averred. There is no want of certainty, so far as I have been able to discover in the plea, and it is not a plea by way of confession and avoidance. A plea in estoppel is not a plea either by way of traverse, or of confession and avoidance; but it is a pleading that, *waiving any question on the fact*, relies merely on the estoppel; and after stating the previous act, allegation or denial, of the opposite party, prays judgment, if he *shall be received or admitted* to aver contrary to what he before did or said. Steph. Pl. 240.

But this plea is bad in substance. The judgment pleaded was not a *decision upon the merits;* and it would be a disgrace to our jurisprudence, if such a judgment would bar any subsequent proceedings having for their object a trial upon the merits. All the authorities are against giving it such an effect. 1 Greenleaf's Ev. § 530, and cases there cited.

As to the plea of *nul tiel record*, I will remark here that there is a record of the recognizance set forth in the *scire facias;* — what shall be its effect I reserve for future inquiry.

The first, second and third causes of demurrer assigned by the defendant in his special demurrer presenting substantially the same points of objection, and they being points of which advantage may be taken by the general demurrer, I shall consider them in connexion with the latter. The fourth cause of demurrer, founded on an alleged insufficiency of the *affidavit* to hold to bail, is well taken for two reasons: 1st, because the *affidavit* is no part of this record; and 2d, because, if it was, it is now too late to object to it. *Hawkins* v. *Gibson*, (1 Leigh, 476.)

The point presented by the general demurrer, and that on which this case must turn at last, is, is the recognizance of bail sufficient in law to bind the defendant?

The cases which have been cited, of decisions upon bail bonds, throw but little, if any light upon this question. In England, all that is required in a bail bond is, that it be made to the sheriff, that it be made to him by his name of office, and that it be conditioned for the defendant's appearance at the

return of the writ, and for that only. 1 Tidd's Pr. 224. And it seems that in this state prior to the repeal of our statute requiring appearance bail, it was not necessary even that the sheriff's name of office should appear in the bond. Per GREEN, J., in *Payne* v. *Britton*, (6 Ran. 103.) A description of the plea, therefore, in the bond, is mere surplusage, and it is altogether immaterial whether it be correct or incorrect: the bond is in no way affected by it. 1 Tidd's Pr. 225. The reason is, that the statute does not require that the action should be named in the bond. To all the particulars required by the statute the bond must conform, or it is void. If it be not made to the sheriff, or be not made to him by his name of office, or if it be single, without any condition at all, or with an impossible condition, or the condition be not for the defendant's appearance, or be for that and something else, it is void by the statute. But this is a case of special bail, and the law has prescribed a particular form, with which every recognizance in such a case must substantially agree. 1 Revised Code of 1819, ch. 128, § 51; Sup. to R. C. p. 266. Decisions therefore, establishing the principle that a mistake in the description of the action in a bail bond does not vitiate the bond, have but little tendency to show that a similar mistake in a recognizance of bail would be attended with equally harmless consequences. There does not seem to me to be any analogy whatever between the two cases. Nor do I think that the cases which have been cited, of adjudications upon recognizances of special bail, are of a character to relieve this case of any of its difficulty. They seem to settle the principle that bail are entitled to be exonerated where the declaration embraces a cause of action distinct from that disclosed, either by the *affidavit* to hold to bail on the process. *Tetherington* v. *Goulding*, (7 T. R. 76); *Levett* v. *Heblewhite*, (6 Taun. 483; 1 Eng. C. L. R. 459); *Grindale* v. *Smith*, (1 M. & Payne, 24; 17 Eng. C. L. R. 161); *Taylor* v. *Wilkinson*, (3 Adol. & Ell. 784; 30 Eng. C. L. R. 213; S. C. 6 Adol. & Ell. 533; 33 Eng. C. L. R. 143); *Thompson* v. *Macirone*, (4 Dow. & Ry. 619; 16 Eng. C. L. R. 210; *Wheelwright* v. *Intting*, (7 Taunt. 304; 2 Eng. C. L. R. 114); *Manerty* v. *Stevens*, (9 Bing. 400; 23 Eng. C. L. R. 315;) S. C. *Moore* v. *Scott*, 563; (28 Eng. C. L. R. 290); *Coppin* v. *Pattee*, (1 Bing. N. C. 443; 27

Eng. C. L. Rep. 451.) In all such cases the bail are discharged by the act of the plaintiff, in declaring in a different action from that in which he caused the defendant to be held to bail. They present no difficulty as to what the undertaking of the bail was, and upon the most obvious principles of justice, there could be none in determining that they should not be held liable for what they had not undertaken. But such is not the case here. The question here is, whether the recognizance, though in form a recognizance of bail in *debt*, be not in fact and in substance a recognizance of bail in *assumpsit?* So that the real difficulty in this case is as to what the bail really did undertake.

The plaintiff has pleaded this recognizance as a recognizance in trespass on the case in assumpsit, and the defendant has demurred. Now as a demurrer admits every fact, which is well pleaded, if this recognizance is pleaded according to its legal effect, the demurrer must be overruled.

In England, a recognizance of bail, taken by a judge at his chambers, when filed, is a record in court. 2 Saund. R. 72d. n. 3. And in New York a recognizance of bail, taken before a single judge of a court, is in legal contemplation, done in court, and is so entered. *Green* v. *Ovington*, (16 John. R. 55.) This, I think, is a sound principle, and applicable to recognizances of bail taken by the sheriff in this state. Our statute expressly requires the sheriff to return the recognizance, together with the writ, to the office from which the writ issued, to be there filed and preserved amongst the papers of the cause. Sup. to R. C. p. 266. This case, therefore, must be regarded as if the recognizance had been entered into in court. And in this view of it, it is perfectly manifest that the word "debt" was inserted in the recognizance by mistake, and that the words "trespass on the case in *assumpsit*" were the words really designed both by the deputy sheriff and the recognizor to have been used. The question, then, which we have to encounter is purely a question of construction. Is this recognizance susceptible of such an interpretation as will make the defendant liable in this action?

This mistake occurs in the description of the subject, on which the recognizance was designed to operate. The rule in such cases is, *Falsa demonstratio non nocet, cum de corpore*

constat. So much of the description as is false is rejected, and the instrument will take effect, *if a sufficient description remains to ascertain its application.* And it is essential that enough remains to show plainly the intent. 1 Greenleaf's Ev. § 301; Broom's Legal Max. 269; 4 Cowen's Phil. note 939, p. 1362; Ibid. note 944, p. 1382. Under this rule the word "debt" must be rejected from this recognizance, and the description which remains is "action of —— now depending in the county court for Accomac county." Is this sufficient to ascertain its application? It refers directly to another writing, the records of the county court, and in such a case both are to be construed together; and one may correct an erroneous description contained in the other; or even vary, or add to, as well as explain it. 4 Cow. Phil. Ev. note 958, and cases there cited. The mistake, then, in the recognizance is corrected by the other portions of the record, which clearly ascertain its application to the action on the case in assumpsit.

The justice of this conclusion will be the more apparent if a recognizance entered into in court be substituted in the place of this recognizance as follows: "Archibald Reid, plaintiff, *v.* William Ewell, defendant. In trespass on the case in assumpsit. James H. White, of this county, comes into court and undertakes for the defendant, that in case he shall be cast in this action of *debt*, he shall pay and satisfy the condemnation of the court, or render his body in prison in execution for the same, or that he, the said James H. White will do it for him. Whereupon it is ordered that the defendant be discharged from custody." The propriety of striking the words "of debt" from this entry is so manifest that it would be a waste of words to attempt to demonstrate it. If this could not be done, and the effect of it should be to annul the recognizance, ours would be a system of technicalities unworthy the name of an enlightened jurisprudence. But strike the words "of debt" from this entry and the recognizance is complete. The words "this action" refer to the heading of the cause, and show beyond question the suit in which the recognizor really undertook as bail. This, however, is in fact not more clear in the case put, than in this case. The recognizance here must be considered as if entered into in court, and the words "action of debt now depending in the county court for Accomac county" as used

in it, are not to be understood in any other or different sense from that in which they would be understood if the recognizance had really been entered into in court. The means of correction are just as safe and complete in the one case as in the other. And in this view it is plain that those words are to be understood in precisely the same sense as the words "this action of debt" in the entry above mentioned.

Now it is to be borne in mind that there is no contest here about facts. That there was a suit pending in the county court between this plaintiff and William Ewell; that that suit was an action of trespass on the case in assumpsit; that the defendant was held to bail; that he was duly arrested and discharged from custody in *that action* upon James H. White's entering into the recognizance here in question; that that recognizance was returned by the sheriff, together with the writ in *that action*, to the office from which the writ issued, and was there filed and preserved amongst the papers of *that cause;* that *that suit* was proceeded in to a final judgment, thus consummating and completing the record thereof; these are facts, established by the record, and uncontroverted here. And the connection between this recognizance and this record is just as clearly and as *certainly* established as it could be if the recognizance had actually been entered into in court, and by *precisely the same kind of evidence*. What the result would have been, if whilst the original cause was yet *in fieri*, upon a rule to shew cause why the bail should not be discharged, the question of fact had been raised, whether this defendant did enter into this recognizance as a recognizance of bail *in that action*, I need not here inquire. But that that question would have been wholly different from the question raised by the pleadings in this cause is perfectly obvious. That would have been a question of fact, but here the fact is undisputed and the question is one of construction. The case of *Cloud* v. *Catlett*, (4 Leigh, 462,) is an authority to show that a recognizance of bail need not be in the precise form prescribed by the statute; and so is the statute itself.

On the whole I am of opinion that the plaintiff is entitled to judgment.

Circuit Court of the United States for the District of Columbia.

Ex parte Reeside.

The court has no authority to cause a writ of *mandamus* to issue to the secretary of the treasury to cause a credit to be entered on the books of the department, when there is no special law requiring such a credit to be entered. Nor have the Court authority to cause the amount of such credit to be paid where there has been no specific appropriation.

Case of *McElrath* v. *McIntosh*, 1 Law Rep. N. S. 399, confirmed.

This was a petition of Mary Reeside, executrix of James Reeside, for a writ of *mandamus* commanding the secretary of the treasury of the United States, *first*, to cause to be entered upon the books of the treasury department, under date of May 12, 1842, a credit to the said James Reeside, (since deceased) of the sum of $188,496 06; and, *secondly*, to pay to the petitioner, as executrix of the said James Reeside, the said sum with interest from the 12th of May, 1842. The petitioner stated that the said James Reeside died on the third of September, 1842, at Philadelphia. That in his lifetime he claimed certain credits upon contracts with the post-office department, which the postmaster-general refused to allow; that the United States brought suit against him in the circuit court of the United States, for the eastern district of Pennsylvania, for a supposed balance of $32,709 62; that the defendant pleaded *non assumpsit* and a *set-off*, upon which issue was joined and such proceedings were had that the jury found the issue for the defendant, and certified that the United States were indebted to the said James Reeside in the sum of $188,496 06. That the United States obtained a rule upon him to show cause why a new trial should not be granted; which rule was disallowed and overruled on the 12th of May, 1842, and upon the same day, "upon consideration of the said court, judgment was rendered upon the verdict aforesaid in favor of the said Reeside," which judgment remains in full force, and is in no part satisfied, annulled, or reversed; whereby he became entitled to have the sum of $188,496 06, carried to the credit of the said James Reeside, under date of the 12th of May, 1842, as the balance then due to him from the United States. That on the

29th of March, 1848, the petitioner exhibited to Robert J. Walker, the secretary of the treasury, her letters of administration and an exemplified copy of the record and proceedings aforesaid in the circuit court, and requested the said secretary to cause to be entered upon the books of the treasury department, under date of May 12th, 1842, a credit to the said James Reeside in the sum of $188,496 06, and also requested the said secretary to pay her the same sum with interest from that date, which he refused to do; "so that the only means of obtaining the money is by application to this court." That in answer to the said demand the secretary said that "her request could not be complied with;" whereas, she avers that the "claim aforesaid has been judicially ascertained and cannot be inquired into, and that the secretary, *by virtue of the general laws of the United States is authorized and required to pay the said sum;* wherefore she prays for the writ of *mandamus*, commanding, &c."

Richard S. Coxe, for the petitioner.

The case is new; but I hope to show that the principle is not new, and that this court has the power, derived from the statutes as well as the common law, to grant the mandamus prayed for. Principles of the highest moment to the citizens and government of the United States are involved in this case. A citizen entered into a contract with an officer of the United States, whose power to bind the government is well known; by which he agreed to perform certain services for a certain sum of money. A disagreement arose between the parties in relation to their accounts, and, by mutual consent, a suit was instituted by the United States, in order that the affair might be judicially investigated. The court were occupied two days in delivering their charge to the jury, and the latter, after having been out a whole week, rendered a verdict in favor of the defendant for $188,496 06. An application was made by the United States attorney for leave to discontinue, but the motion was refused by the court. After the verdict, a motion was made on the part of the plaintiff for a new trial, and that motion was denied. An appeal was taken to the United States supreme court, but it was subsequently abandoned. The matter has twice been brought by the petitioner before congress,

but no action has been had upon it by that body. The secretary has refused to act, and our hope is now in the judiciary.

By this verdict and judgment, it is now settled, that there is a large amount due to Reeside; and the only question now is, whether the judiciary has power to coerce the payment. The 3d article of the constitution confers upon the supreme, and such other courts as shall be established by congress, the entire judicial power of the United States. The second section of that article, which indicates the extent of the power, declares that it shall extend to all cases arising under the laws of the United States, or in which the United States shall be a party. This is a case arising under the laws, and in which the United States is a party. In 1795, the supreme court held, in the case of *Chissell* v. *The State of Georgia*, (2 Dallas, 478,) that, under the constitution as it then existed, states were suable. This led to an amendment of the constitution, by which states were exempted from suit. In 1801, an act was passed re-organizing the courts. (Sec. 2, Stat. at Large, 92.) By that act, jurisdiction was given to the circuit courts over all cases, in law and equity, in which the United States should be *plaintiffs*. The act of February 27, 1801, (2 Stat. 103,) makes the same distinction; thus restricting the power given by the constitution to the judiciary. Can it be doubted, that the United States *may* authorize suits to be brought against it? The power has frequently been exercised by congress. Citizens of Arkansas, Louisiana, and other states, have been expressly authorized to institute suits against the United States. One such suit has been known in this court; — that of *Van Ness and others* v. *United States*.

The question is this: Has congress invested the circuit court of Pennsylvania with the power to decide in relation to the rights of the parties, and this court with the power to enforce their judgment. The act of March 3d, 1797, (1 Stat. at Large, 512,) passed shortly after the decision in the case of *Chissell* v. *State of Georgia*, was an act avowedly to provide for the settlement of accounts. The 4th section of that act provides that in suits between the United States and individuals, no claim for credit shall be admitted upon trial, but such as shall appear to have been presented to the accounting officers of the treasury, and by them disallowed in whole or in part.

Jurisdiction over the credits rejected by the treasury officers, is conferred upon the court. It is an appellate jurisdiction from the decision of those officers. This court has a right to say that a voucher is correct, and that party is entitled to credit therefor; and if such voucher is found good by the court and jury, they cannot say they will not allow the same as an offset and not otherwise. The power of the court, as an appellate power, is coëxtensive with that of the officers of the treasury. With the aid of a jury, they have full power in every case where a claim has been *rejected* by the accounting officers of the treasury. In case ten suits should be brought by the government for a thousand dollars each, a single voucher for five thousand would kill the whole *seriatim*. The case has been decided more than once. The suits could not all be lumped together, and the five thousand apply as an offset merely to so many as it should cover. The defendant is entitled to every credit for all his claims. The terms of the act of 1797 are broad and comprehensive. See also *The United States* v. *Wilkins*, (7 Wheat. 143.) In the case of *Walton* v. *The United States*, (9 Wheat. 651,) the opinion was delivered by Judge Duvall, who had for many years served as First Comptroller of the treasury, and is clear and strong in favor of this doctrine. If the court has the power of deciding whether the auditor has properly rejected a claim, it may go farther. In the case of *The Bank of the Metropolis* v. *The United States*, (15 Peters, 377,) the court received proof far beyond the claims of the United States, but decided that it had not power to award a judgment against the government. Circuit courts have, in several instances, given judgment against the United States. The case of *The United States* v. *Fitzgerald*, was an ejectment suit brought in the circuit court of Louisiana, brought by the government to recover possession of land claimed by preëmption right by the occupant. The court held, that an *equitable* right was good against a *legal* claim of the United States, and enjoined the government against all further proceedings to disturb the occupant in his possession. On appeal, the supreme court said, (15 Peters, 467,) that the judgment of the court in Louisiana, being in the ordinary form in that estate, ought not to be disturbed.

The debt in this case has now been judicially proved. It is

now a judgment. The decision of the accounting officers has been overruled. We are entitled to the credit. Since July, 1847, there has been a large general appropriation, out of which the debt might and ought to be paid. But, at any rate, we are entitled to credit upon the books.

Congress has no power under the constitution to examine and pay claims. It is exclusively vested in the judiciary. If the courts of the United States have not power to compel the government to pay, ours is the only country in the world where that power does not exist in the judicial tribunals.

At common law, no judgment can be given for the defendant; but under the law of Pennsylvania, the defendant, by becoming a party to the record, has a right to a judgment.

Ransom H. Gillet, Solicitor of the Treasury, denied the jurisdiction of the court, and declined to appear.

CRANCH, C. J. As to so much of this petition as asks for a *mandamus* commanding the secretary to pay the money, it is sufficient to say, that there has been no specific appropriation of money to pay it; and no money can constitutionally be drawn from the treasury of the United States without such an appropriation.

And as to so much of the petition as asks for a *mandamus* commanding the secretary to cause a credit to the said James Reeside, to be entered upon the books of the Treasury Department, for the sum of $188,496 06, this court has no jurisdiction or authority to issue such a writ to the secretary of the treasury; because there is no special law directing him to enter such a credit on the books of the treasury as there was in Kendall's case; and because it would command him to do an official executive act, in the performance of which he had a right to exercise judgment and discretion, and in which this court has no jurisdiction to guide and control him.

The cases of *Marbury* v. *Madison*, *Kendall* v. *United States*, *Decatur* v. *Paulding* and *Brashear* v. *Mason*, which were largely cited in *McElrath* v. *McIntosh*, (1 Law Rep. N. S. 399,) at the present term, are considered by this court as decisive of the present case.

The court therefore refuses to issue the mandamus as prayed.

Supreme Court of Vermont, Lamoille County, April T., 1848.

SPAULDING *v.* PRESTON.

The rights of sheriffs and executive officers of courts to seize counterfeit coin, &c., considered on the general grounds of preventive justice as well as of statute regulation.

When counterfeit coin has been seized under the direction of a prosecuting officer to be used as evidence against a person awaiting trial, and for the further purpose of preventing its circulation, an action of trover will not lie against the sheriff, especially if the owner fail to show that the coin was put into its present form without his knowledge, or at least against his consent.

Where the original taking of goods was unlawful, and a wrong which the courts will redress, an action of replevin will lie to relieve the owner of goods from irreparable loss by long delay.

The opinion of the court, embodying the important facts, was delivered by

REDFIELD, J. This is an action of trover, against the sheriff of Caledonia County, for eleven hundred pieces of German silver, of the precise size and thickness of Mexican dollars, and made in that form, for the purpose of being *stamped* and *milled* into *counterfeit coin* of that description. The defendant took them within his own county, from one Russell, who is shown by the case, to have been carrying them, at the time, to a place of manufacture, for the purpose of having them *finished*, so that he could put them *in circulation*, as genuine coin. They were originally *taken* from Russell, and are still *detained*, under the authority of the state's attorney of Caledonia county. Russell has been indicted, by the grand jury of that county, and the indictment is still pending there. These pieces of partly finished counterfeit coin are detained for the double purpose of being used, as evidence, upon the trial of Russell, and also of preventing their being put in circulation.

These are the important facts contained in the plea in bar, which was held bad, upon demurrer. We might say more upon this *form* of presenting the defence, if that point were material to the decision, or had been much insisted upon in the argument of the case. But as substantially the same facts were admitted upon the trial of the general issue, and are confessedly the important facts in the case, we should feel bound to open

the case, for the purpose of having them properly presented, where the party had mistaken his right to present them in the form of a plea in bar. We understand the law of pleading, under the old rules in England, to be, that such a defence, as the one here presented, is bad, in form, as amounting to the general issue. 1 Chit. Pl. 491.

But as it seems to have been expected we should determine the case, upon its merits, we proceed to state the additional fact, which was proved upon the trial of the general issue, that these pieces of counterfeit coin were, at the time of the seizure by the defendant, the property of one Foster, so far as property can exist in such a thing, and that Foster has, since the seizure, transferred *his rights therein* to the present plaintiff. It is not stated in the case, whether Foster, or the present plaintiff were in fact conusant of the crime of Russell, *or how*, *or why*, they should have a claim to this "stuff," and not be *participes* with Russell. That is left to the *natural* and *legal* intendments, we suppose; upon the ground, doubtless, that it is useless to encumber a case with proof, where no intendment will be likely to prejudice the case, beyond its just deserts. The plaintiff, then, coming in under Foster, stands simply in his place. And as Foster claims property in a thing, in so "questionable a shape," without accounting for the *unfortunate guise* in which his claim is presented, we can only suppose, that no proof, in his power, would make the case more favorable for him. He must be content, then, for the present, to be esteemed a *particeps* with Russell. If he in fact owned this metal, before it was cast in this mould, and can satisfactorily show, that it was put in its present form without his knowledge, or against his consent, it may avail him hereafter. But no such thing is pretended, even in argument, and what constitutes the extreme impudence, and indeed insult of the claim is, that it does not seem to be supposed, that such an inquiry is pertinent to be put to the plaintiff. The court below, the plaintiff seems to suppose, have so viewed the subject, in rendering a judgment for him, wherein they estimated for him the *value* of *his property*, upon some standard, either of its *cost*, or its *utility for honest* or *fraudulent purposes*, and which, we know not. But as the sum recovered was less than $50, we suppose the plaintiff recovered nothing for the *improved condition*, in which he, or his agent,

had put the metal. We have examined the subject with great care, and have come to the following conclusions. The great inquiry in the case undoubtedly is: Can this action of *trover*, under the circumstances of this case be maintained in the courts of this state, for the recovery of the *value* of *this property?* If so, then *trespass* will lie for the *original taking*. For if that was *lawful*, then also is the *detention*, for the same reason, being for the same object. If, too, the original taking was *unlawful*, and a *wrong*, which the *courts of this state will redress*, Russell himself might, it would seem, immediately upon the taking, have brought *replevin*, and regained the possession of his counterfeit coin, and thus have *wished* and *obtained* the aid of the *courts* of the state to *relieve* him from *irreparable loss*, by a too long delay, in offering his goods, while the market was brisk. This is always, we believe, a good ground for instituting replevin, to prevent loss in the depreciation of property during a pending litigation, although it may not be a necessary ground, in order to sustain the suit. Such seems to be a necessary result of the principles contended for, and which seem to be necessarily involved in maintaining this action, unless some distinction can be fairly made out between the plaintiff's rights, and those of Russell. And although the proposition may sound somewhat absurd and ludicrous even, it will not be considered, we think, an unfair deduction from the principles necessarily involved in the case. And one, who asks *so much* as this plaintiff does, *should* not shrink, and would not *be expected* to shrink, from the *necessary consequences* of what he asks, *at the hands of justice*. But for many reasons, we cannot accede to the *justness* or *legality* of this claim.

At a very early period in the history of the criminal law of this state, it was, by statute, made the duty of sheriffs and other officers to seize counterfeit coin, counterfeit bills, and all tools, by means of which counterfeit money of any description was about to be, or might be made. In the Revised Statutes of 1839, the provision in regard to counterfeit coin is omitted, the others all being retained. That this was a mere oversight is sufficiently apparent from the utter absurdity of any supposed distinction between the necessity, or propriety of seizing the "stamps, dies, plates, blocks, and presses," &c., which are named in the statute, or "bank bills," which are also named, and

seizing coin, which is not named. It is obviously nothing done by the legislature *ex industriâ*. No one will pretend, that the maxim, *expressio unius exclusio alterius*, can have any possible application here. It is a mere oversight.

But as the matter stands, the defendant's authority must rest merely upon general grounds of *preventive justice*, aside of any statute whatever upon the subject. All governments, upon the most obvious principles of necessity, exercise more or less of preventive force, in regard to all subjects coming under their cognizance and control. This is in analogy to the conduct of individuals, and indeed of all animal existence. Many of the instincts of animals exhibit their most astonishing developments, in fleeing from the elements, from disease, and from death, at its most distant sound, long before the minutest symptom appears to rational natures. This is the great secret of personal enterprise and success. So, too, in the history of civil governments *prevention* is more *important*, and far more *available*, than *cure*. All sanitary cordons and preventive regulations; every thing in regard to the police of our cities and large towns, indeed prohibitions of lotteries, gambling houses, brothels and disorderly taverns, whether done by general statutes, or mere police regulations, all come under the right of *preventing* more serious injuries by *stifling* the *fountains* of evil. *Obsta principiis* is as just a maxim here as any where. And in doing all this, it must of course somewhat interfere with the natural rights of individuals. — One infected with contagion is instantly removed beyond the reach of contact. A ship or cargo, coming from an infected port, is subjected to long delay and great expense, to prevent the possibility of spreading pestilence. This may in some instances endanger the lives and health of the individuals concerned, and must always, more or less, affect property, and abridge personal liberty. And it is often done without any special law of the state, and may always be so done, as in the case of cholera suddenly breaking out in some remote inland town. And what would be thought of an action of assault and battery, brought against a health officer, who removed the plaintiff from a town, or village, to prevent contagion; or against the peace officer, who laid his hand upon one, under an honest belief that he was insane, or when he was in fact so, and rushing through the street, with a lighted torch to burn

some public edifice, or commit some other irreparable injury? or if you please, against the sheriff of the county, who by the direction of the prosecuting attorney for the state, detains counterfeit coin, or those partly finished? We find no such actions in the books, and the want of precedent shows the general sense upon the subject, when it is notorious that the public officers in our cities, subject persons suspected of crime, and every species of engine, or material with which it is even suspected they intend to operate, to just such restrictions as they deem proper, and this without regard to any special provisions of statutory enactments. The same is true also of those suspected of infection. And in regard to unwholesome provisions, if found to be so in a dangerous degree, there is no doubt they might even be destroyed. So too of books and prints, and of all other devices to corrupt the public morals, property cannot exist in them. They are regarded as public nuisances, and any one may destroy them. So too certain trades are considered common nuisances in places of great public resort, or concourse, like smelting of certain metals, slaughtering animals, &c., which would be likely to endanger the public health. And gambling houses and brothels have been regarded as common nuisances in the cities, and might justly be so regarded wherever they exist, perhaps. Society in all these cases and many others, has the right to *anticipate*, in order that it may prevent the injury, which is thus threatened. If it were not so, men, in a social state, would be far more powerless, for purposes of defence, than in a natural state. All will admit the right to restrain a mad man, or a mad animal from committing injury. And is the rational man or the senseless material, which threatens crime or irreparable injury, less subject to control, than the maniac, or his torch? And if the incendiary could hardly be expected to have an action of trespass, or trover, for *his* dark lantern, or the bank-robber for *his* saws, and files, and false keys, can the counterfeiter, or his accomplice, any more maintain an action for his base coin, whether in a finished, or unfinished state?

The right of private persons, *to make arrests*, on their own mere motion, without any *special statute*, and without express warrant, was distinctly recognized in the discussion of a late case in the common pleas, in Westminster Hall, *Elliot* v. *Allen*,

(50 Eng. Com. Law R. 38, 1845,) long since the transaction occurred, out of which the present action grew. And this right, in every subject of the realm, is there recognized, for the mere purpose of *preventing crime*. And if the right of personal liberty, which is always reckoned among the most sacred of civil rights, may be thus violated, by private persons, upon their own mere motion, much more, it would seem, may such rights of property, as one may be supposed to have, either in counterfeit coin, or in the materials in an unfinished state, be disregarded by a public officer.

The following is the law as laid down in Bac. Ab. vol. 6, tit. *Trespass*, letter D, p. 579, upon that subject. A private person may, without express warrant, arrest persons, who are actually fighting, and keep them in custody, until their passion is over. Has that state of safety yet occurred, in regard to this coin? If surrendered, it would seem there should be some security, that it should not be applied to the same use. Certainly not in this state! So it is said by Bacon, one may arrest one coming to assist another in a fight, Ib. 1 Hawkins, Pl. Cr., C. 3, § 11. So may one arrest another who is on the point of committing murder, or treason. So he may justify breaking and entering one's house, and imprisoning him, "to prevent his committing murder on his wife." *Hancock* v. *Baker*, 2 B. & P. 260. "A private person may, without an express warrant, confine a person disordered in his mind, who seems disposed to do mischief to himself, or any other person." Bro. Ab. *False Imprisonment*, Pl. 25, 28. So he may arrest a night-walker, Ib. *Wheale's case*, from the year books, 22 Edw. 4, fo. 45, pl. 10, is to the same effect in substance. Will it then be said the sheriff is liable to this action?

We shall only mention two other grounds upon which we think it impossible to maintain this action.

1. It was necessary to *detain* this base metal, as matter of evidence, against Russell. A mere description, either of the form, or quality of the pieces, would be much less satisfactory, than the inspection, by the jury and witnesses upon the stand.

2. Courts of justice will not sustain actions in regard to contracts, or property, which has for its object the violation of law. If a gang of counterfeiters had quarrelled about the division of their stock or tools, a court of justice could hardly be expected

to sit, as a divider among them. If one had taken the whole, in violation of the laws by which such associations subsist, a court of law could not interfere, because it is not presumed to be expert in such questions. And if it were, it is considered a public scandal, that such matters should be there discussed, or adjusted. Such property is, so to speak, *outlawed*, and is common plunder. One who sets himself deliberately at work, to contravene the fundamental laws of civil governments, that is the security of life, liberty, or property, forfeits his own right to protection, in those respects, wherein he was studying to infringe the rights of others. The man who attempts the life, or the liberty of another, forfeits, for the time, all right to the protection of his own life, or person; and the person assailed may justly destroy both, if necessary, in his own defence, or if he may be fairly supposed to have esteemed it necessary, under the circumstances.

So, too, if any member of the body politic, instead of putting his property to honest uses, converts it into an engine to injure the life, liberty, health, morals, peace, or property of others, he thereby forfeits all right to the protection of his *bona fide* interest in such property, before it was put to that use. And he can, I apprehend, sustain no action against any one, who withholds or destroys his property, with the *bona fide* intention of preventing injury to himself or others.

A distinguished English Judge, Lord Ellenborough, I think, once said, in the trial of an action in the king's bench, in regard to an illegal control, that he would not condescend to sit, as an arbitrator, in regard to the division of spoil, among highwaymen. What he would have said, had one of the gang presumed to bring *trover* against the sheriff of London, for an unreasonable detention of the booty, during the pendency of an indictment against an accomplice, it is difficult to conceive. If such a plaintiff *got out of court*, without *getting into Newgate*, with his accomplices, he might esteem himself fortunate. This is doubtless the first action of the kind, to be found upon the records of any court; but we are aware that for that reason alone it by no means follows, that it will be the last. We live, we know, in an age of improvements and discoveries. "New customs, be they never so ridiculous, nay, be they unmanly, yet are followed." It is by no means certain, that this kind of

action may not hereafter be ranked among the bold innovations, and masterly advancements of the age. My Lord Holt said, that he was a bold man, who first ventured to use the general counts, in assumpsit, notwithstanding that had then become the general mode of declaring in that action. And the courts have been constantly extending and facilitating remedies for every wrong, so that we would not have the plaintiff despair of even this remedy, soon being firmly established, in precedent and practice. But at present *its novelty is so glaring* that *we dare* not venture to adopt it.

Judgment reversed and case remanded.

[From the Code Reporter.]

Supreme Court of New York, Orange County, October Special Term, 1848.

CROSBY AND OTHERS *v.* LEWIS AND OTHERS.

A devise to "children," means "legitimate children," if there are any; and unless a contrary intention appear on the face of the will, evidence *dehors* the will will not be admitted to show the testator's intention.

THE facts of the case are as follow: — Increase Crosby, in and by his last will and testament, among other things, devised as follows: "I will and bequeathe to my daughter, Mary Lewis's *children*, the farm which I purchased of the Seggars, called the Seggar farm, together with the one hundred acres I purchased from Dr. John Morrison, to them and their heirs forever. A question arose, whether an *illegitimate* son of Mary Lewis could take under this will. He had been recognized by the testator as one of his grandchildren.

S. J. Watkin, for the plaintiffs.
J. W. Brown, for the defendants.

EDMONDS, J. In this case, the question was as to the meaning of the term "children," used in the will of the testator, and whether in the term children could be included an illegitimate child. In this case there are legitimate children to answer the description contained in the will — and that being so, I think the illegitimate child is not included. There is

nothing in the will itself manifesting any intention to include the illegitimate child, and such an intention cannot be inferred from any facts out of the will, nor can evidence of such facts be admitted for the purpose of showing the intention of the testator.

Court of Common Pleas, of Massachusetts, Essex County, December Term, 1848, *at Ipswich.*

LORING *v.* ABORN.

Rights of railroad conductors and passengers.

THIS was an action of trespass against a railroad conductor, for ejecting the plaintiff from the cars of the Boston and Maine Railroad, under the following circumstances: The plaintiff got into the cars at Lawrence with a ticket for North Andover. It is a rule of the railroad, that passengers must, immediately after starting, surrender their tickets, or pay their fares if they have no tickets, or be turned out of the cars by the conductor. The plaintiff, when asked for his ticket by the defendant, showed it, but refused to give it up at that time, (alleging that on a former occasion he had been put out of the cars after giving up his ticket,) but promising to give it up when near the end of his route. There was no stopping place between Lawrence and North Andover. The conductor then stopped the train, and on the plaintiff's persisting in his refusal, put him out by force.

N. W. Harmon and *Dan Weed*, for the plaintiff.
George Minot, for the defendant.

MELLEN, J., ruled that the regulation of the road was reasonable, and that the plaintiff had no right to retain his ticket till he had got near the end of his route, even if he had not previously known of the rule, and that on his refusal to give it up, the conductor was justified in ejecting him with a reasonable degree of force; and that under the circumstances (it being evident that the plaintiff meant to try his right,) it made no difference that the conductor did not demand payment of the

fare before ejecting the plaintiff; that the only question for the jury was, whether unnecessary force was used; and the judge observed that the jury on this point would not be very nice in scanning the acts of the conductor in the line of his duty, but would make allowance for any little irritation on his part produced by the conduct of the plaintiff; that the burden of proof on the question of the degree of force was on the plaintiff, and that, unless the jury were satisfied that too much force was used, the defendant was entitled to a verdict.

Verdict for the defendant.

Court of Appeals of South Carolina, Law Term, 1848, *at Columbia.*

The Court of Appeals of this state commenced its sessions at Columbia, November 29, and adjourned on December 22. Present, Justices Richardson, O'Neall, Evans, Wardlaw, Frost and Withers. The following decisions were made among others.

Walker & Bradford v. *Crittenden.* — A letter containing money to discharge a debt, was delivered to a gentleman to carry to Hamburg and deliver to the plaintiffs. He met one of the firm at Edgefield, and informed him of the letter, its contents, and offered to deliver it to him there; this was declined; but Mr. Walker (the partner) told the gentleman having the letter, to carry the letter to Hamburg, and if it was inconvenient to deliver it at the mercantile house, to hand it to the postmaster. It was handed by the gentleman who had it in charge, to the stage-driver, and by him handed to a man who was supposed to be the postmaster; he, however, denied the receipt. It was held, the loss was the defendant's and not the plaintiff's.

Hunter and wife v. *Hunter, Ex'r.* — The plaintiff's wife lived with deceased many years, and served her most faithfully. The deceased often declared she would compensate her by a legacy. This was not done to the value of her services. It was held, that the plaintiff could only recover on an express contract to pay her for her services by a legacy. That such a contract could not be implied, and that a recovery could not be sustained on the indebitatus count. Leave was given to amend and add a special count.

Thompson and wife, Scott and wife v. *Gordon.* — In these cases, the father of the wives of the plaintiffs, delivered property to the defendant, his son, at a valuation, the same to be paid to them, at his, the father's death. He lived many years after, gave the defendant a receipt in full, and left a will, by which he bequeathed his residuary estate to members of the defendant's family.

Held, 1st. That as the promise was for the benefit of the plaintiffs,

they could maintain the action. 2d. That the contract was not within the statute of frauds. 3d. that the statute of limitations did not bar the action, as the cause of action accrued at the death of the father, and not at the making of the contract. 4th. That neither the receipt nor the will of the deceased, could discharge the liability of the defendant.

State v. *Maberry.* — One taking upon himself to act as a constable, and suffering a prisoner to escape, may, in the indictment, be charged as a lawful constable. A general charge that the prisoner was brought before the magistrate, charged with trading with slaves, and that a warrant of commitment was issued and delivered with the prisoner to the defendant, and that he suffered the prisoner to escape, is sufficient.

State v. *Sims.* — Where one rode his horse so near to another as to create a belief he intended to ride upon him, or shook a hickory over his head, either would be an assault, unless the defendant had qualified his acts by words showing no such intention.

Generally, the acts of a party constitute the evidence of his intention.

Ray et al. v. *Hill and Archer, Ex'ors.* — A blind man may execute a will. The execution, if in his immediate presence, and within the reach of his other senses, is lawful. His signature by a mark is good.

Owens Ads. Morris. — In the description of a tract of land sold, well described by boundaries, and by reference to a grant, the vendor says, "the said W. A. O., only conveys two hundred acres, that part claimed by the estate of Goode is not conveyed," &c. the claim of Goode reduced the land sold to a hundred and forty-two acres; it was held, that the description was a covenant of warranty, that not less than two hundred acres were conveyed.

Truman v. *Clarke and Wells.* — The plaintiff on a joint and several note, failing to prove it against one of the apparent makers, may discontinue and take judgment against one by whom the note is proved to be made. The payee of a note payable to M. D. W. or bearer, transferring it to the plaintiff for a valuable consideration, signed his name below the other makers, without the same being known to them; this is not a joint contract; but it does not extinguish the note by the payee and maker being apparently the same. It is a good several promise to the plaintiff, the bearer.

Mitchell, Trustee, v. *Smith.* — A deed, required by the laws of Virginia, to be recorded in the county where the grantor resides, and in each county where the property (personal) "remains," was recorded in the county of the grantor, and in each of the counties through which it passed in its transit to South Carolina and Georgia, but it was not recorded in the last county, Henrico, from which it (tobacco) was shipped to Charleston, until after the shipment. It was held good in South Carolina, recording of such deed not being by law required. In such case, too, of transit, recording in the county where the grantor resides, is sufficient.

Shields and the Attorney-General v. *Jolly.*—Judgment delivered on the 18th inst. The testator (Burnett) bequeathed his estate, after *the death* of his wife to the *Methodist Church*, of which she was *at that time* a member. She was at her death a member of Liberty Church Society. It was

held, that the bequest was in favor of and for the benefit of the Methodist Church or Society of Liberty, and not for the Methodist Church in general, or as represented by the annual conference of South Carolina.

Parkins v. *Dunham.* — In this case, it was held, that where a prescriptive right to flood the plaintiff's land, by a mill-dam, had once existed, but the dam went down, and the water ceased to flow over the land, and the owner cleared and cultivated it for eight years, *it* was not enough, by analogy to the statute of limitations of the action on the case, to defeat the prescriptive right.

Hindman v. *Lanford.* — The plaintiff was the surety of A. to Y. in a promissory note, and A. at his request, and to secure him, deposited a bale of cotton with Y. to pay the note. The defendant represented to Y. that he had agreed with Hindman to pay the note, and that he was to have the bale of cotton, it was delivered to him, but he did not pay Y.; the plaintiff was therefore obliged to pay the note. It was held he was entitled to recover the amount so paid from the defendant.

Jones v. *Jones.* — A. and his wife separated in 1819, she held (from that time) and exercised various acts of separate ownership of a slave; such as mortgaging and hiring, until her death, in 1844. She answered separately in Equity, in 1824, was treated throughout as a *feme sole*, in that case, and by the decree. She conveyed the slave to her son in 1838, and he consented in writing to the arrangement, that she was to retain possession until her death. It was ruled, that the jury might presume, that the conveyance was as agent of the husband, or that it was in consequence of a power to dispose of the slave, as a *feme sole*, by a post nuptial marriage settlement.

Daniel v. *Harley.* — A written admission by the defendant, as sheriff, of a sale made by him, but not entered in his sale book, cannot affect the rights of the debtor or creditor. The sheriff may be liable on such a paper individually, but in this case, the admission not being equivalent to the entry in the sheriff's book, was held not to be enough to charge him. The sheriff is liable in an action on the case, for not entering a sale made by him in his sale book.

Butler v. *Harper.* — In an action for malicious prosecution, it appeared that the defendant stated the facts truly to the magistrate, of the removal of rails by the plaintiff, from the defendant's fence, and he therefore issued his warrant for larceny. The solicitor gave out a bill, which the grand jury returned no bill; it was held, that there was no legal charge of larceny, and that the defendant was not liable for the mistake of the magistrate.

Ordy v. *Bell.* — A receipt cannot be pleaded as a release or discharge of a bond. It is merely evidence of payment. A demurrer ought to have been sustained to such plea, it was overruled, and the plaintiff had leave to reply, and it was held, that the defendant had no right to complain. For if the proper decision had been made, he would have been concluded on that plea. Under the decision, he was allowed the benefit of his receipt as evidence. The facts showed that nothing was given for the receipt, it was held to be neither a discharge nor payment of the bond.

Shannon et al. v. *Dinkins, Adm'r.* — (2 cases.) In these cases the defendant pleaded the general issue, and *plene administravit* — the verdict was for the plaintiffs on the general issue, and for the defendant on *plene administravit*. It was ruled that the plaintiffs were entitled to judgment *quando bona acciderint* for their debts, and the costs of the action on the general issue, but the defendant was also entitled to his judgment for costs against the plaintiffs on the pleas of *plene administravit*.

Broughton v. *Brailsford.* — In this case a verdict found against the trustee for lumber furnished for a house built for Dr. Felder and family was sustained. The book [a petty ledger] containing the entries awkwardly made, was evidence to charge the defendant, being made against him, especially when sustained by proof that the house was built on defendant's land, and that the lumber for it came from the plaintiff's mill.

Charlotte and S. C. Railroad Co. v. *Blakely and Drafts.* — (2 cases.) The defendants, before the organization of the Company, signed an agreement to take stock; they did not pay $5 per share, on each share subscribed, (the charter declares the subscription void without such payment;) they did not enter their subscription on the books; *they never attended personally, or by proxy at any meeting*. They were held not to be liable for instalments, called for on their stock, or on their agreement to take stock.

State v. *Christopher et al.* — It is not necessary to aver in an indictment for harboring, that a slave was a runaway. The name by which he is known by the owner, is a sufficient description. A witness sustaining no relationship to the parties, cannot be sustained by his previous statements out of court. A verdict convicting the defendants on the facts was sustained.

Dogan v. *Ashby.* The plaintiff's habit to loan money on usurious interest, cannot be given in evidence to sustain a doubtful witness (the principal) proving usury in a note now in suit.

A juror to be examined as a witness ought not to sit on the case; but it is no ground for a new trial, when there is abundant other proof of the same fact to which he testified.

McElhenny v. *Wylie.* — A stranger cannot officiously assist the sheriff in a levy, without his command. If he does, he cannot justify without shewing himself faultless in every particular.

The sheriff may take an assistant with him to make a levy. The defendant was held on the facts to be a trespasser, without justification or excuse. Verdict sustained.

State v. *Barber et al.* — The defendants with great tumult, and noise, blowing horns, firing guns, &c., attended, without invitation, at a place where a marriage was celebrated. It was held that it was proper to shew by the previous acts of some of the party, that their conduct was not the result of friendship. It was held that such acts, no matter how often repeated in the settlement by others, were no excuse for the defendants. A verdict convicting the serenaders of a riot was held to be right.

Notices of New Books.

United States Digest; being a Digest of Decisions of the Courts of Common Law, Equity and Admiralty, in the United States. By John Phelps Putnam, of the Boston Bar. Vol. I. Annual Digest for 1847. Boston: Charles C. Little and James Brown. 1848.

This volume is the first of a series, which is to be regularly continued by annual publications, one volume being put to press in January of each year. It is in continuation of the great United States Digest, already published by Little & Brown in three original and two supplemental volumes. The present volume contains a digest of the latest volumes of the reports of twenty-two out of the thirty States of the Union, — of the last volume of Howard's S. C. Reports, and of the volumes of Circuit Court Reports by M'Lean, Story, and Woodbury & Minot.

In addition to the many other requisites of a good digest, the present volume contains a "table of the cases cited with references to the volume and page of the reports, and the titles and pages of the digest, where found." This table occupies one hundred and twelve pages, and is, of itself, of no ordinary value. A similar table, comprising all the cases cited in the three first volumes of the United States Digest, and in the two supplemental volumes is already in press. These tables will be as important to lawyers, as city directories to express-men, and will furnish the first complete guide-book to the labyrinth of American law.

The present volume of the digest has been prepared by Mr. Putnam, systematically and with care. We welcome it, not only on account of its own merits, but because it promises well for what is to come hereafter.

Reports of Cases Argued and Determined in the Superior Court of the City of New York. By the Hon. Lewis H. Sandford, one of the Justices of the Court. Volume I. New York: Published by Banks, Gould & Co., Law Booksellers, No. 144, Nassau Street. And by Gould, Banks & Gould, No. 104, State Street, Albany. 1849.

This is the first of a series of reports of the decisions of the New York superior court, a local tribunal, now composed of Mr. Chief Justice Oakley, and Justices Vanderpool and Sandford, the latter of whom reports the decisions.

As the jurisdiction of this court is not generally known out of the state of New York, we take the liberty of printing the publishers' preface, merely adding that the Reports are every way worthy of the court and of the learned judge who has prepared them.

"The publishers, in presenting to the public a volume of the decisions of the Superior Court of the City of New York, beg leave to refer briefly to the position and character of that tribunal.

"It has jurisdiction of all actions, in which, either the subject-matter is within the city, or the parties are there served with process. Under the Judiciary Act of 1847, and the Code of Procedure, this jurisdiction extends to equitable, as well as legal actions. By both of those statutes, its decisions are subject to review in the Court of Appeals, and are removed directly thither for that purpose.

"Thus, in the City of New York, and in respect of parties there served with process, although residing elsewhere; the Superior Court is in point of civil jurisdiction, on the same level with the present Supreme Court of the State.

"Formerly, when its judgments were reviewed in the late Supreme Court, and when it had no equitable jurisdiction, it became, and for nearly twenty years was, the principal commercial court in the city. Probably no single legal tribunal in the United States, has within that period, passed upon as many important questions of commercial law, or upon suits involving so much property, as has the New York Superior Court. From its elevated character, its situation in the American metropolis of trade and commerce, and its enlarged jurisdiction; it is believed that faithful reports of its decisions, will be an advantage to the bar not only of this city and state, but of the whole country. The bar of New York has long expressed a desire for such a publication; and Judge Sandford having, for a time, in addition to his arduous duties on the bench, undertaken the labor of preparing them, the publishers are confident that the series of reports now offered, will command the approbation of the profession, both for their entire accuracy and their intrinsic merit.

"Note. — It should be mentioned that all the judgments of Oakley, Ch. J., contained in this volume, except that in *Herring* v. *Fisher*, page 344, were delivered orally, and were reported from notes taken when they were pronounced."

Arrest of Aaron Burr. By Albert J. Pickett, of Montgomery.

This is a small pamphlet, containing a chapter from a history of Alabama, now in preparation by Colonel Pickett. It relates to an interesting period in the life of Colonel Burr, and contains facts never before published. If we can find room, we shall print an extract or two, shortly.

Miscellaneous Intelligence.

The Association of the Bar.

We publish herewith the proceedings of the adjourned meeting of the Bar, which was held in the supreme court room, and the report made by Mr. Rantoul.

Boston, Jan, 18, 1849.

An adjourned meeting of the Bar of Massachusetts was held this day.

Robert Rantoul, Jr. Esq., in the absence of the chairman of the committee appointed at the meeting held on the 4th inst., made a report, which was read by him, and it was voted to consider the articles separately, and not to act upon the preamble until all the articles had been considered.

Articles 1 and 2 were adopted as reported.

Article 3 was amended by striking out the words "*the bar in this state*," and inserting "*practice in the courts of the commonwealth*, and by striking out the clause "*And fifty members shall constitute a quorum.*"

Articles 4 and 5 were adopted.

Article 6 was amended by striking out the words in 2d and 3d lines "*any member or members of the Association*," and inserting "*the complainant.*"

Articles 7 and 8 were adopted.

Article 9 adopted with an amendment at the end. "*And fifty members shall constitute a quorum at all said meetings.*"

Articles 10, 11, 12, 13 and 14 were adopted.

Article 15 adopted with an amendment. "*And upon the hearing of such appeal a vote of three-fourth parts of the members present shall be necessary to the affirmation of the decision of the executive committee.*"

Article 16 was adopted with an amendment, that "*Whenever any complaint made as aforesaid, whether against a member of this association or not, shall be founded on any alleged deceit, malpractice, or other gross misconduct within the provisions of the Revised Statutes, the solicitor, in addition to the other proceedings hereinbefore prescribed, shall represent the same to the court in the county where the member resides, in order that the court, if they see fit, may direct the necessary legal proceedings thereon.*"

Pending the question upon the adoption of the seventeenth article, it was

Voted, That the report with the amendments be laid upon the table, and that the committee be requested to cause the same to be printed, and a copy forwarded to every member of the bar in the commonwealth, with

a notice of a future meeting to be held at such time as the committee may designate for the purposes of final action upon the constitution and the organization of the association by the choice of officers.

Attest,

EDWARD BLAKE, *Secretary.*

The following is the report made by Mr. Rantoul.

REPORT.

The committee appointed at the meeting of members of the bar of the commonwealth, holden on the 4th instant, to prepare and present for consideration a plan of organization, have the honor to submit the following report of articles of association.

CHARLES G. LORING, *Chairman.*

Boston, Jan. 18, 1849.

Articles of Association of Members of the Bar of Massachusetts.

PREAMBLE.

The undersigned members of the Bar in the Commonwealth of Massachusetts, actuated by a sense of the dignity and honor that should pertain to a profession established for the administration of justice, — upon whose fidelity to its high obligations, the security, welfare, and moral elevation of society must in a great measure depend, and believing that an organized system of communion among its members throughout the state, will be productive of equal gratification and advantage in promoting more frequent and extensive social and friendly intercourse, and in the increase of mutual respect and confidence; and may be alike beneficial to the public and themselves, as conducive to the maintenance of a high standard of professional duty and character; and as distinguishing those who recognize and desire to sustain the true position of members of the bar, and exonerating them from all communion in reputation with those who disgrace it, — hereby declare their assent to the following

ARTICLES OF ASSOCIATION.

ARTICLE 1. The purposes of the Association, to which all its efforts and influences are to be directed, are declared to be the cultivation of social and friendly intercourse among its members, and the elevation of the standard of professional duty, education and character.

ARTICLE 2. The name of the society shall be "The Association of Members of the Massachusetts Bar."

ARTICLE 3. Any person admitted by the court to *the Bar*,[1] and residing within it, may become a member of the Association by subscribing the articles, a copy of which will be in the hands of the clerks of the court of common pleas, or of some other person appointed by the executive

[1] This is as in the original draft. The words in italics were stricken out, and others substituted. In all practicable cases, amendments are designated by italics.

committee, for that purpose; and payment to him of the sum of two dollars.

And fifty members shall constitute a quorum.

ARTICLE 4. The officers of the Association shall be a president, two vice-presidents, solicitor, secretary, treasurer and two directors from each county (computing Suffolk with Nantucket, and Barnstable with Dukes county as respectively constituting one county for this purpose) who shall be elected by ballot at the annual meeting, and continue in office until successors are chosen. But no person shall be eligible to the office of president, vice-president, solicitor, secretary or treasurer, for more than two terms successively; nor at any time after a second election thereto until the expiration of two years from the termination of his preceding term of service therein. The directors from each county shall be nominated by a majority of the members present therefrom, or, upon failure of such nomination, by one at large, and hold office for two years, excepting that at the first election one shall be chosen for one year only, in order that thereafter one director shall be chosen from each county at every annual meeting.

ARTICLE 5. The above-named officers, except the solicitor or such of them as shall from time to time be elected, shall constitute a board denominated the executive committee; in which shall be vested all the powers of the Association when not in session, whose proceedings shall be always subject to the revision and control of the Association, at any regular meeting thereof.

And ten members of the committee shall constitute a quorum.

ARTICLE 6. It shall be the duty of the solicitor to receive all complaints made in writing signed by *any member or members of the association*, and he shall report the same to the executive committee at their next regular meeting or at a special meeting, unless he shall be previously satisfied that such complaint is manifestly unfounded. And if the executive committee shall direct a hearing thereof, it shall be his duty to prepare and produce the evidence, and render such aid in the trial as ordinarily devolves upon a prosecuting officer.

He shall have the right of appointing any member, not an officer of the Association, as his assistant, who shall render all the service that may reasonably be required; and to require such incidental aid from any other members as may be reasonably required of them.

And no person shall decline or resign the office of solicitor or assistant without leave of the Association, under penalty of forfeiture of membership; unless he shall have previously served for two years in that office.

ARTICLE 7. The secretary shall keep separate records of the proceedings of the Association and of the Executive Committee, shall notify all meetings and certify all proceedings thereof, and perform the usual duties pertaining to the station of a recording and certifying officer. And he shall produce his records at every annual meeting, and whenever otherwise called for by the Association or Executive Committee, and such records shall be open to the inspection of any member of the Association at all reasonable times.

ARTICLE 8. The treasurer shall receive and disburse all moneys belonging to the Association ; and make a report at each annual meeting and whenever otherwise required by the Association or the Executive Committee, of all receipts, and payments, and funds, and debts of the Association with such other information as may be requisite for a full exposition of its pecuniary condition.

ARTICLE 9. There shall be an annual meeting of the Association at such time and place as the Executive Committee shall from time to time direct, unless otherwise appointed by the Association, for the purposes of social intercourse, and attending such addresses, lectures, or readings, as may be given by members, and the transaction of business. And it shall be the duty of the Executive Committee to make suitable arrangements therefor at the expense of the Association. And especial meetings may be called by the Executive Committee whenever adjudged expedient, of all which meetings seasonable written or printed notice shall be addressed to every member.

ARTICLE 10. The Executive Committee shall hold semi-annual meetings at such times and places as a majority shall appoint. And especial meetings may be called by the president, or a vice-president, and one or more directors upon written request to the secretary to notify the same, setting forth the purposes, and time and place thereof; — all which shall be inserted in written or printed notifications addressed in good season to each member.

ARTICLE 11. At the annual meeting a member shall be elected by ballot to deliver an address at the next annual meeting. And if it shall appear prior thereto that the person thus appointed will not be able to deliver one, it shall be his duty or that of any one having such information, immediately to notify the secretary, who shall thereupon convene the Executive Committee for the purpose of appointing a substitute.

ARTICLE 12. Upon the death, absence or disability of the solicitor, secretary or treasurer, the Executive Committee shall appoint a substitute to serve *pro tempore* or until an election by the Association as may be necessary. And the president or either of the vice-presidents may summon a meeting of the committee for that purpose.

ARTICLE 13. Each member shall contribute annually such sum of money, not exceeding five dollars, as the Executive Committee shall from time to time assess for defraying the expenses of the Association ; including those of publishing and distributing to the members such addresses, lectures and readings as may be delivered before it.

ARTICLE 14. Any one removing his residence, with the intention of continuing it out of the state ; or omitting to pay his assessments for two successive years, shall cease to be a member of the Association ; and the secretaries shall make record thereof, and report thereupon at the next annual meeting. But members so removing, and judges in this commonwealth, and jurists of distinguished excellence and ability in other states may be elected honorary members at the annual meetings of the Association.

ARTICLE 15. Any member may be expelled from the Association for

conduct which shall be adjudged by the Executive Committee to have been in obvious violation of the duties or unbecoming the character of a member of the bar. *Provided*, that written complaint thereof, signed by *one or more of the members of the Association*, shall have been presented to the solicitor; and by him laid before the committee; and written notice thereof, containing a copy of such complaint, and stating the time and place when and where the same will be heard, shall have been given by the secretary by order of the committee to the person complained against, with ample time for him to appear and answer by counsel or otherwise as he may elect; and that at least three-fourth parts of the members present shall vote for such expulsion. But an appeal shall lie from the Executive Committee from such decree, if desired, in writing by the party against whom the complaint shall have been made, and a general report of the proceedings upon any such hearings by the committee, and of the result shall be made by the solicitor at the next annual meeting. (*See Amendments.*)

Article 16. If like complaint be made of any member of the bar in this state, not being a member of the Association, it shall be the duty of the solicitor and Executive Committee to institute proceedings, giving to the person complained against the like right of appearing and answering; and if upon such investigation a like majority of the committee shall be of opinion and resolve that by reason of the proof of such complaint laid before them, it is expedient and proper for the members of the Association to withdraw and withhold all professional intercourse with such person. Report thereof shall be made by the secretary at the next annual meeting, subject, however, to the right of appeal to the Association, if requested in writing by the person against whom the complaint shall be made. (*See Amendments.*)

Article 17. No member of the Association shall associate or be connected in professional service, by retainer, consultation, advice, or otherwise, with any person thus expelled from the Association, or adjudged unworthy of professional intercourse, excepting in cases where such person shall be himself the party interested, and not retained or employed as counsel, or professionally for some other person. And any member intentionally violating the provisions of this article shall be himself liable to expulsion therefor.

Article 19. All expenses actually incurred by the officers of the Association in the discharge of their respective duties shall be defrayed from the funds of the Association, but no compensation, direct or indirect, is to be allowed for their services.

Article 20. No alteration or addition shall be made in or to the articles of Association unless at an annual meeting or at one called especially for that purpose, the notifications for which shall have set it forth, and by a vote of two-third parts of the members present.

New York Code of Procedure. — We very much regret to learn, by an article in the New York Evening Post of the 22d December, that a

combination is on foot among certain members of the bar of that city, to effect a repeal of the entire code adopted at the last session of the legislature, and considered in our July number. The editor of the Post remarks that there is no probability "of the combination proving successful, but an opposition stealthily organized to effect so important a revolution, must inevitably beget a disposition for resistance, which will prevent such amendments as are needed to give the new practice its highest efficiency. The people of this state, we believe, generally approve of the plan of the new system, and would defend it as it stands, rather than submit again to the system which it superseded. The profession, likewise, are far less disaffected with its novelties than when they were first called to put it in motion. The new code was somewhat crude, we believe all admit, nor did the commissioners pretend, when they reported it, that the value of their labors was not somewhat diminished by the extreme haste in which those labors were performed. It will be remembered, however, that the commissioners were goaded almost monthly by the legislature, the press, the bar, the people, by everybody who felt the burdens of the old system, for a report. In compliance with the public sentiment, though at the risk of their reputation and of the system which they cherished, they made a partial report, embracing mainly, the organization of the courts and the system of pleadings, but not covering one-half of the realm of legislation committed to their revision. When the remainder is completed, and adjusted to the fragment already in force, (and this will be done doubtless during the approaching session of the legislature,) so that the entire proportions of the work may be scanned by the profession, the hostility to which we have referred we trust will subside or give place to a friendly disposition to unite with the commissioners in improving it."

The profession, not only in New York, but throughout the country, are very much divided in opinion in regard to this important innovation. But whatever may be the final result of this bold experiment in legal reform, it is due to the dignity of the great state in which it has originated, and to the arduous labors of the distinguished gentlemen upon the commission that it should have a full and fair trial. Least of all, ought the bar to interfere in the present stage. They owe it to the community, to the government, and to the character of their own profession to forbear meddling. If there is any one evil which the members of the American bar have justly complained of, it is the hastiness and fickleness of our legislation. And it would justify the most severe reproaches that have ever been heaped upon the profession, if from a selfish regard to their own interests, they should strive for an immediate repeal of the new code. The confusion and embarrassment resulting from the first change were serious enough. A retrograde movement will involve more serious consequences.

Besides this, it should be remembered that the bar of the "Empire State" are not exclusively interested, but as we said before, the lawyers of the whole Union, and those of England quite as much as those of America, are watching this experiment. The London Law Review for August, 1848, contains an able and interesting article, from which we select a few disconnected extracts, *pro* and *con*, as indicative of the atten-

tion which has already been drawn to this reformatory movement on the other side of the water.

"Respecting the first head, (as to courts of justice and their jurisdiction) our space will allow us to say but little at present, though we had marked very numerous subjects for extract and comment. There is much on the heads of jurisdiction and appeal we do not fully agree with, particularly as to restriction of appeals in interlocutory matters, and as to the arrangement 'by which judges sit as appellate authorities over one another. A. and B. being appellate judges over C., C. and B. over A., and C. and A. over B.' Our English experience, when the seals were in commission, certainly was quite conclusive against any plan of this sort.

"The scheme of amalgamating the jurisdiction of all the courts, so far as metaphysical distinctions prevailed, and the consequent union of legal and equitable cognizance, has our warm admiration; but the question, how far it is wise to measure jurisdiction by the amount at stake, is one which requires, in our mind a very thorough and scientific inquiry. We do not like rough justice for the poor, and polished justice for the rich. Public morals require a rule exactly the reverse, if all justice is not to be alike polished. The plan by which the judgment of the small debts courts can be enforced throughout the whole state is worthy of study."

. . . . . .

"Are the commissioners right in aiming at one uniform procedure? Is such a result desirable? The forms they have prepared of pleadings are not the natural language of a man complaining; why may he not complain in any form he pleases? The principle as to evidence, that none offered by either side should be rejected, but all taken for what it is worth, would seem to be equally applicable to pleadings also. Is it not well to leave an option to suitors as to forms and methods; and in this way will not there be room for an experience to arise as to which is best?

"Again, if forms are to be laid down by some authority, should the legislature deal with mere procedure at all? Should not the whole scheme be under the control of the judges, and the responsibility of all forms thrown on them? To tell men, even though judges, how, and how only, they are to do their work, is often to make them restive. At any rate, has not the legislature gone too much into detail? And should not the judges have power by rule to vary any part of the act? Till after experiment, we do not believe anything can be predicated of procedure with certainty. The wise course seems to us to open as many roads as possible, and to let the suitors find the best. The speaker we have quoted seems to us to have indicated what is desirable for a practice; "There was literally no form about it." Our readers will observe that one remarkable effect of the amalgamation of jurisdiction has been, *ipso facto*, to make choses in action assignable.

"Query, have not the commissioners improperly retained the present common law rules (barely, if at all, recognized in our own equity courts) as to defences which may be taken by demurrer, and which, if not taken, are waived? Why, if the plaintiff has no legal capacity to sue, or why, if there ought to have been other parties joined, is the objection ever to be held waived? Either full justice requires the observance of these rules or it does not. If it does, then why is it not observed, though the party omitted to demur? If it does not, such a rule should be repealed. Are not all the distinctions between demurrer and answer a part of the very metaphysical subtleties which the commissioners have so ably exposed? Is not the plan of Louisiana, in which the only pleadings are petition and answer, the right?

"It seems to us, that the interest of the community at large in seeing the most perfect justice done in each case which is attainable, is not sufficiently borne in mind in the code. The value of all property, the rectitude of all fiduciary dealings, the moral character of a people, are deeply involved in the accuracy of the dealings of the courts. It is a shallow error to think that the well working of courts of justice is the concern rather of the litigants, than of the community. Had we judges as perfect and inexorable as Minos and Rhadamanthus, and courts as perfect, and a

practice as free from special pleading, as the sub-mundane ones, how much would not such circumstances tell on the condition of us all — non-suitor as well as suitor!

"No variance between allegation and proof shall be material [says sect. 145] unless it has actually misled the adverse party to his prejudice. When will *our* courts entertain this most obvious truth?

"The code says [s 208] that in any trial of action for recovery of money or of specific real or personal property, where there is an issue of fact, it must be tried before a jury, unless the trial is waived by the parties, but that every other issue of fact is not to be so tried except by the order of the judge. Query, if this distinction is founded on any real difference; — and if it is not inconsistent with the principle on which all the important changes of the code are based? The experience of our country courts is relied on by the commissioners. That experience is quite at variance with the distinction we remark upon.

"The whole proceedings upon execution we consider open to grave question. Both here and in America we think the wrong principles in force. We think that justice requires that the only execution should be by bankruptcy; and that when, from the recusancy or incapacity of a debtor, the state steps in to enforce payment, it should seize his goods, for the benefit of all his creditors, not of the plaintiff only. The bankrupt law and the law permitting private and individual execution are irreconcilably at variance.

"Upon the question of costs the views of the commissioners seem to have great wisdom.

"'We cannot perceive,' say they, 'the right of the state to interfere between citizens, and fix the compensation which one of them shall receive from the other, for his skill or labor. Government is instituted for the preservation of order, and the protection of rights. It is not its province to make bargains for the people, or to regulate prices. This it assumes to do, in respect to the dealings between lawyer and client. It fixes the price of skill and labor. It has no more just right to do this, than it has to fix the price of property; it may prescribe the salary of the clergyman or the fee of the physician, with as much reason as the compensation of the attorney.'

"But the very able remarks of the commissioners on this subject we must postpone consideration of. The mischief of the scheme of paying by length they expose: 'The system is wrong for two reasons; one that it encourages the multiplication of processes, and the other that it is not proportional to the real labor performed.'

"The plan they propose as to costs against an adverse party, is to assess it by way of per-centage on the amount recovered; and they allow any bargains *bona fide* made between solicitor and client respecting the solicitor's remuneration.

"Expressing, once more, our profound admiration of the labors of the procedurists of New York, and of the ability and energy of the one individual to whom the whole is so mainly to be traced, we must for the present, at least, conclude this very desultory and, we fear, unsatisfactory notice, in the hope that we may some day resume the subject, and give, not merely a fuller account of their great work, but also the history of the agitation which led to its being ever undertaken."

The change in New York has been very radical. Previously to the adoption of the new constitution, no state exceeded New York in the tenacity with which its members adhered to the old common law rules of pleading and practice. In Massachusetts the whole system has undergone a thorough modification. In Pennsylvania, there was always a blending of equitable elements in their system. But in New York, the strictness of the old English system had been most sternly insisted upon. On this account, the recent change has been felt to be a most violent one, and its violence will be felt most at first. Let us, therefore, hope that

when the necessary confusion shall have passed away, and when this measure becomes felt in its more remote consequences, that the new code will be found to contain principles worthy of being transmitted to posterity.

A Squinting Jury. Once upon a time, or to be a little more particular, nearly half a century ago, (for the editor of this paper well remembers the time, place and scene, which are firmly fixed upon his boyish recollections) there dwelt in the town of ——, in old England, a remarkable oddity, in the person of an attorney at law, who, although not fair to look upon, (for he was in truth one of the homeliest specimens of humanity ever beheld by mortal man) was withal a person of sound judgment, great benevolence, varied learning, a poet, a painter, and a wit of no mean order.

It so happened that the aforesaid gentleman, G—— G——, Esq. was appointed high sheriff of the town of ——. He was a man of fortune, and had a kind heart, as many a poor prisoner could testify, who partook of the good cheer with which the prisoners were liberally supplied at Christmas, and other well-known festivals, from the private purse of the high sheriff.

It was of course the duty of the high sheriff to summon a grand and petit jury, to attend at the quarter sessions, of which the recorder, mayor, and alderman of the borough composed the court. In the performance of his official duty in summoning the petit jury, our high sheriff indulged in some of the strangest and drollest freaks that have probably ever been heard of in any other town or country. In the first place he summoned for the October court, a jury consisting of twelve of the fattest men he could find in the borough, and when they came to the book to be sworn, it appeared that only nine jurors could sit comfortably in the box! After a great deal of sweating, squeezing and scolding, the panel was literally jammed into the box, and when seated, they presented to the eye of the court, the barrister, and the audience, "the tightest fit" of a jury that was ever seen in a court room. Literally they became, much to the astonishment of the court and its robed advocates, "a packed jury," and no mistake!

For the January term, our facetious high sheriff (in consequence, it was said, of some hint from the recorder that their should be no more fat panels summoned to his court,) went into the opposite extreme. He summoned twelve of the *leanest* and *tallest* men he could find in the borough; and when they took their seats in the box, it appeared comparatively empty — there was indeed room for twelve more of the same sort and dimensions.

For the April term of the court, our humorous functionary summoned a jury consisting of twelve barbers! Now it so happened that among the latter were the perruquiers who dressed the recorder's and barristers' wigs, and some of the latter, arriving late at the bar, had to appear that morning in court with their wigs undressed or half-dressed, so as to cut a very ridiculous figure, amidst the smiles and half-suppressed laughter of

the by-standers. The high-sheriff enjoyed the fun amazingly, but looked "grave as a judge," while he tried to keep silence in the court-room.

But the crowning joke of this waggish functionary occurred at the summoning of his fourth and last jury, at the summer session, in July. For that term of the court, the high sheriff not having the fear of the recorder, the mayor, and the aldermen before his eyes, actually summoned a squinting jury! twelve as queer looking bipeds as ever took their seats in a jury box — a jury that was probably more looked at, and laughed at than any of the appointed twelve that ever were sworn, to "well and truly try and true deliverance make between their sovereign lord and king, and the prisoner at the bar."

But the scene was so irresistibly droll that the learned recorder could not maintain his gravity. The mayor and aldermen followed suit. The barristers laughed while their wigs became bald, powderless; nay, even the poor prisoners in the dock, who were to be put upon their trial, and some of them undergo transportation, could not refrain from joining in the general cachinnation! And when the learned recorder commanded the high sheriff to bring the court room to order, and intimated with a half-suppressed laugh, that the latter ought to be ashamed of himself for summoning *such a jury*, the drollery of this court scene was heightened considerably by the quick, ready, and sonorous response of the high sheriff, who, looking at the same time at the squinting jury, exclaimed, "All good and lawful men, your honor." — *Eng. Paper.*

Emigrant Tax. We copy the following extract from the New York Journal of Commerce, which is the fullest account we have been able to get (in season for this number) of the recent important decision at Washington. It is not perfectly clear whether it is the Massachusetts or New York case which has been decided. We give this account in the absence of anything more authentic. Some of our readers will undoubtedly get a more complete report from other sources.

"Important Decision. We understand that a telegraphic despatch was received here yesterday from Washington, announcing that the Supreme Court of the United States have decided against the constitutionality of the poll tax, levied under a law of this state upon officers, seamen, and passengers arriving at this port, for the benefit of the Mariners' Fund, as it is called. Whether the decision affects the whole tax, or only so much of it as has been paid under protest, we are not at present informed. The following extracts from the recent report of our state comptroller, relate to the subject.

"The question has not yet been judicially settled by the supreme court of the United States, in reference to the constitutional right to collect that portion of the fund paid into the treasury under protest. The first that was paid under protest was on the 22d of June, 1844.

"The sum of $60,000 authorized to be advanced from this fund by the laws of 1848, (chap. 191 and chap. 352,) has been paid, and for which the treasury will be liable if the right to collect the money is decided against the state. It is understood that a case involving a similar ques-

tion from Massachusetts, is now on argument before the supreme court of the United States. We may hope soon for a decision.

"It is the Massachusetts case, we presume, which has now been decided, but the principle involved is the same in both. The amount of money still in the treasury belonging to this fund, which was paid under protest, is $75,331. There has also been deposited under protest in the New York Life and Trust Co. and Bank of the State, a sum belonging to this fund, which amounts, including interest, to $36,381. A portion of the proceeds of this tax have been applied for a long period to the benefit of the Marine Hospital at Quarantine, and another portion latterly for the use of the Commissioners of Emigration. The total receipts at the Marine Hospital (chiefly if not entirely from this source,) were in 1843, $21,456; in 1844, $35,137; in 1845, $42,740; in 1846, $65,236; in 1847, $95,142. Total in five years, $266,711. To what extent these various interests will be affected by the decision, we cannot at this moment tell.

We clip the following from one of the New York newspapers as throwing more light upon the decision, which, it seems, has only been agreed upon.

"WASHINGTON, Jan. 22.

"IMPORTANT DECISION OF THE SUPREME COURT. This tribunal has agreed upon a decision of vast consequence to the state of New York, and indeed to all the states upon the sea board.

"A majority of the court have agreed to render judgment adverse to the constitutionality of the laws of states imposing taxes upon alien passengers arriving in their ports.

"The states whose interest will be most seriously affected by this issue of the long pending controversy upon this question, are New York, Massachusetts, Louisiana, Maryland, Texas, and Pennsylvania.

"I learn that opinion stood equally divided in the court, for a long time, upon the New York and Massachusetts case, and it thus stood *in æquilibrio* after the last argument of Messrs. Webster and Van Buren, until the arrival of Judge McKinley, which made a full bench.

"It is impossible at present to get at the precise points decided. Judgment will not be rendered until near the end of the term, which will be about March 10th.

"There will be many opinions delivered, hardly any one of the justices agreeing in the reasoning of any other. Nor is it easy to state the aggregate effect of the decision.

"It is based upon the general principle that the states can pass no laws to obstruct commerce, legalized by the laws of the Union, that consequently, no tax can be levied upon the passengers while on board the ship, though within state jurisdiction, nor upon the owners of the vessel at any time.

"Thus the states are thrown upon the pecuniary responsibility of immigrants, who are as innocent of "continental dimes" as Captain Tobin was. B."

JUDGMENT BEFORE ARGUMENT. Long time ago there dwelt in a city of the west, not far from Pittsburg, a worthy gentleman who held the responsible office of justice of the peace. He knew some little about law, and a great deal of natural justice. His decisions frequently excited the indignation of the young lawyers who pleaded before him, but he never suffered himself to be influenced by the statutes which were brought up against his opinions, or the indirect threats of disappointed law expounders. In fact, his office was a court of equity in every sense. It was useless to bring law in opposition to his sense of right. He used to say, "I am a justice, and bound to administer justice, and no petty technicalities shall ever make me decide against the teachings of my conscience." It is hardly necessary to say that many curious things happened in the office of this independent justice.

A case was one day brought before the squire, which certainly required his peculiar system of administering justice. John Doe had sued Richard Roe for a just debt, but Richard had, by the aid of an attorney, found a loophole by which he expected to creep out of the necessity of payment. The case wore a very doubtful aspect, and both parties employed lawyers to plead for them.

The squire heard the witnesses patiently, rose to his feet, wrote a few seconds at his desk, seated himself again, and gave signs of being ready to attend to whatever might be said. The counsel for the defence made the most of his quibble in a speech which lasted an hour. When he had concluded, the plaintiff's counsel rose, and labored and perspired for another hour to overturn the quibble. He also finished, and then followed a slight pause. The squire sat still, puffing a cigar, and apparently quite at ease. The lawyers both picked up their hats, looked at each other, and then at the motionless squire. At length the counsel for defendant spoke.

"I suppose you'll require a day or two to think about this case, squire."

"Can't say I'll ever think of it again," replied the squire, with an air of mingled indolence and indifference.

"What do you mean?" inquired the other lawyer.

"What do *you* mean, gentlemen?" asked the squire.

"We wish to know when we may look for a decision," said defendant's counsel.

"You may look for it now if you please, gentlemen—here is the docket."

"The docket!"

"Yes; I entered judgment for the plaintiff (looking at his watch) *a little better than two hours ago.*"

"This, gentlemen, is my ——"

But the lawyers did not wait until the sentence was finished; nor did they ever again appear before the just justice without being sure that they dealt in plain facts, unaccompanied by law technicalities and quibbles *Nat. Intelligencer.*

BUTLER *v.* BUTLER. The president of the court of common pleas (Philadelphia) decided the motion recently argued in this already famous litigation, in favor of Mrs. Butler. The court ordered the parts of the answer beyond the denial of the libellant's allegations, to be stricken out as surplusage, the exceptions to be dismissed, and the cause to be set down for trial by jury. It was to prevent this disposition of the case that Mr. Butler's exceptions were filed and the motion was made, to which the decree refers.

JUDICIAL SALARIES. A bill has been reported in the House of Representatives of this commonwealth, to increase the salaries of the chief justice of the court of common pleas to $2500, and that of the associate justices of the same court to $2300, the act to take effect from and after the 1st of April, proximo.

Insolvents in Massachusetts.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Commissioners.
Angell, Gilman,	Ware,	Dec. 16,	Myron Lawrence.
Baily, Paul Jr.,	Sterling,	" 11,	Henry Chapin.
Baker, William,	Ipswich,	" 18,	John G.King
Barker, John T.	Charlestown,	June, 2,	G. W. Warren.
Bennett, Need, et al.	Boston,	Jan. 5,	J. M. Williams.
Bowker, Joel Jr.	Boston,	" 1,	J. M. Williams.
Brackett, George P.	Lynn,	Dec. 1,	John G. King.
Bristol, Alvin L.	W. Stockbridge,	" 6,	Thomas Robinson.
Burbank, George G.	Worcester,	" 30,	Henry Chapin.
Clark, Joseph V. et al.	Lynn,	" 19,	John G. King.
Cummings, A. Beaman,	Oxford,	" 6,	Henry Chapin.
Davis, Howard,	New Bedford,	" 21,	David Perkins.
Dayton, Goodrich M.	Worcester,	" 12,	Henry Chapin.
Dewey, Mark,	Richmond,	Jan. 2,	Thomas Robinson.
Dunbar, Thomas J.	Georgetown,	Dec. 5,	John G. King.
Elmer, Orriah O.	Ashfield,	Nov. 9,	D. W. Alvord.
Farnham, Isaac,	Andover,	Dec. 8,	John G. King.
Foster, David P.	Lawrence,	" 5,	John G. King,
Green, Hezekiah H. et al.	Williamstown,	" 18,	Thomas Robinson.
Hale, E. G. & W.	Mansfield,	" 7,	David Perkins.
Harriman, John,	Haverhill,	" 3,	John G. King.
Harris, Timothy N.	Stoneham,	" 11,	Asa F. Lawrence.
Haskell, W. E. P. et al.	Boston,	Jan. 13,	J. M. Williams.
Hildreth, Samuel,	Lynn,	Dec. 16,	John G. King.
Joslayn, Henry,	South Hadley,	" 8,	Myron Lawrence.
Kellogg, Dexter,	Montague,	" 30,	D. W. Alvord.
Leach, Josiah F.	Boston,	" 30,	J. M. Williams.
Levy, Mark et al.	Boston,	Jan. 5,	J. M. Williams.
Martin, Richard,	Boston,	" 18,	J. M. Williams.
Morris, E. H. et al.	Williamstown,	Dec. 18,	Thomas Robinson.
Neff, William J.	Boston,	Jan. 8,	J. M. Williams.
Norton, Lyman C.	Otis,	" 2,	Thomas Robinson.
Parker, S. & W.	Rockport,	Dec. 7,	John G. King.
Rowley, James,	Greenfield,	" 7,	D. W. Alvord.
Shepard, Calvin,	Ashland,	" 11,	Asa F Lawrence.
Spalding, C. et al.	Boston,	Jan. 12,	J. M. Williams.
Stimpson, C. L. et al.	Lynn,	Dec. 19,	John G. King.
Thompson, Charles et al.	Coleraine,	" 6,	D. W. Alvord.
Thompson, C. Jr. et al.	Coleraine,	" 6,	D. W. Alvord.
Thompson, Hollis et al.	Coleraine,	" 6,	D. W. Alvord.
Toney, William J.	Rockport,	Nov. 8,	John G. King.
Valpey, Joseph H.	Lynn,	Dec. 28,	John G. King.
White, Charles H.	Boston,	" 26,	John G. King.
Whittier, George,	Haverhill,	" 9,	J. M. Williams.